BRB No. 99-0982 BLA

JAMES C. MITCHELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DANIELS COMPANY	)	DATE ISSUED: 06/28/2000
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth, Bluefield, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

Rita Roppolo (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-0320) of Administrative Law Judge Stuart A. Levin awarding benefits on a claim filed pursuant to the provisions of Title

IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found that, at the informal hearing before the district director, the parties agreed that claimant was a coal miner within the meaning of the Act and that employer met all the requirements for designation as responsible operator. Decision and Order at 1. The administrative law judge found that these stipulations were supported by the record. Decision and Order at 2. The administrative law judge further determined that the evidence of record established the presence of complicated pneumoconiosis and therefore invocation of the irrebutable presumption at 20 C.F.R. §718.304. Decision and Order at 2-5. Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in conducting a hearing without explicitly informing employer of its right to be represented by counsel. Employer further asserts that the administrative law judge erred in determining that it was properly designated as the responsible operator in this case. Finally, employer contends that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis inasmuch as the administrative law judge failed to weigh all the relevant evidence. Claimant responds and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief asserting that the administrative law judge was not required to inform employer of its right to counsel. The Director further contends that the administrative law judge properly concluded that employer was the responsible operator in the instant case.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in conducting a hearing without advising employer of its right to representation by counsel. Employer asserts that inasmuch as the Board has held that *pro se* claimants must be informed by the administrative law judge of their right to legal representation, *see Shapell v. Director, OWCP*, 7 BLR 1-304 (1984), an employer who appears at a hearing without legal representation is entitled to the same notice by the administrative law judge. Employer asserts that its position in the instant case is no different from that of a *pro se* claimant, and that the failure of the administrative law judge to inform employer of its right to counsel offends notions of due process of law and equal protection. Employer further asserts that the administrative law judge should have at the very least inquired as to whether employer wished to have a continuance in this case upon the "glaring demonstration" by employer's representatives that they did not understand "how the hearing was to be conducted." Employer's Brief at 7.

On October 7, 1998, the administrative law judge held a hearing in which both claimant and the Director were represented by legal counsel, but employer was represented

by Ms. Brenda Hager, employer's "Executive Assistant", and Mr. Robert Knight, employer's "Shop Superintendent".

In *Shapell*, *supra*, the Board held that the administrative law judge had not made an adequate inquiry regarding claimant's *pro se* status. Specifically, the Board held that the administrative law judge merely inquired as to whether claimant wished to proceed *pro se* without informing him that he has a right to representation and that he would not suffer any economic loss as a result of representation. *Shapell*, 7 BLR at 1-307. The Board also indicated that in *Shapell*, the administrative law judge did not determine whether claimant's lack of representation was voluntary. *Id*.

The basis for the Board's holding in *Shapell* is 20 C.F.R. §725.362(b) which, in pertinent part provides:

> [i]f an adjudication officer determines, after an appropriate inquiry has been made, that a **claimant** [emphasis added] who has been informed of his or her right to representation does not wish to obtain the services of a representative, such adjudication officer shall proceed to consider the claim in accordance with this part, unless it is apparent that the claimant is, for any reason, unable to continue without the help of a representative."

20 C.F.R. §725.362(b).

Contrary to employer's assertion, an administrative law judge is not required to inform an unrepresented employer of its right to counsel. Neither the Act nor the regulations contain a provision similar to Section 725.362(b) which would require an inquiry when an employer appears without counsel. Section 725.362(b) and the holding in *Shapell* recognize the very real policy implications in allowing claimants to proceed unrepresented by legal counsel, *i.e.*, claimants' general lack of formal education, and lack of awareness of formal agency proceedings. While employer may point to specific instances where there is a lack of understanding by its designated representatives at the hearing, we are unable to say that such circumstances are sufficient to grant employer a broad right not mandated by the Act or the regulations. Accordingly, we reject employer's argument that the administrative law judge erred in failing to specifically inform it of a right to legal counsel.[1]

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[1] Employer also asserts that, if the Board rejects its contention that a second hearing is required based on the administrative law judge's failure to inform it of its right to counsel,

Employer further asserts that the administrative law judge erred in concluding that it was the responsible operator in this case. Employer asserts that its stipulation that it was the responsible operator at the informal conference was contrary to its previous positions as enunciated in its original operator response, Director's Exhibit 27, and statements made at the hearing, *see* Hearing Transcript at 43-60. Employer further contends that statements made by employer's representatives at the hearing demonstrate a complete lack of awareness of the nature of the stipulation. Accordingly, employer asserts that it should not be held to be bound by its stipulation.

On September 18, 1997, an informal conference was held. Subsequently, on September 29, 1997, a "Proposed Decision and Order Memorandum of Conference" was issued. Director's Exhibit 29. In the Proposed Decision and Order, the district director concluded that "[a]ll parties agreed that [employer] meets all requirements for designation as responsible operator." Director's Exhibit 29; *see* 20 C.F.R. §§725.491, 725.492, 725.493. Subsequently, the district director concluded that claimant was unable to establish total disability due to pneumoconiosis and found that claimant was not entitled to benefits. Director's Exhibit 29. The Proposed Decision and Order gave any party opposing the recommendation of the district director thirty days to appeal, all or part of the recommendation. Claimant subsequently appealed and the sole issue set for hearing was the question of total disability, the only issue identified as contested. Director's Exhibit 31.

The regulations provide that, at the conclusion of a conference, a party shall, in writing, either accept or reject, in whole or in part, the findings rendered pursuant to the conference. If, within thirty days, no objections to the findings are made, they are deemed accepted by the parties. 20 C.F.R. §725.417(d); *see Key v. Alabama By-Products Corp.*, 8 BLR 1-241 (1984). Inasmuch as employer failed to challenge the district director's designation of it as the responsible operator, it is bound by the district director's finding on the issue.[2]

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liability for benefits should be assigned to the Black Lung Disability Trust Fund based on the administrative law judge's failure to so inform employer and the resulting violation of employer's due process rights. Inasmuch as we conclude that the administrative law judge has committed no error in this regard, we decline to address this assertion.

[2] Moreover, contrary to employer's assertion, substantial evidence supports the administrative law judge's determination that the record supports a conclusion that claimant did the work of a coal miner for employer and that employer was the responsible operator in this case. *See* 20 C.F.R. §§725.491, 725.492, 725.493. Pursuant to Section 725.492(c), a rebuttable presumption exists if:

Turning to the merits of entitlement, employer contends that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis and that claimant was therefore entitled to the irrebutable presumption of total disability due to pneumoconiosis, found at 20 C.F.R. §718.304. Employer asserts that the administrative law judge failed to weigh all evidence relevant to the existence of complicated pneumoconiosis, specifically x-ray evidence and medical opinion evidence which calls into question the existence of the condition. Director's Exhibits 12, 13, 15, 16, 18; Claimant's Exhibits 1-4. In concluding that claimant established invocation of the irrebutable presumption, the administrative law judge found that the record is "replete" with readings diagnosing the presence of complicated pneumoconiosis, Claimant's Exhibits 1, 4, and that Dr. Jabour presented a well-reasoned and documented opinion diagnosing complicated pneumoconiosis, Director's Exhibits 15, 19; Claimant's Exhibit 4.

In order to establish invocation of the irrebutable presumption at Section 718.304, an administrative law judge must consider all relevant evidence found at each subsection pursuant to Section 718.304(a)-(c), and then weigh together such evidence prior to finding the presumption invoked. *See Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir.1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-131 (1991)(*en banc*). In the instant case, the record contains a medical opinion by Dr. Navani which, while diagnosing the presence of simple coal workers' pneumoconiosis, rules out the presence of complicated pneumoconiosis, Director's Exhibit 18. The record also contains several x-ray interpretations which similarly only diagnose simple pneumoconiosis and do not diagnose complicated pneumoconiosis. Director's Exhibits 12, 13, 15, 16; Claimant's Exhibits 3, 4.

While the administrative law judge has noted the presence of this evidence, Decision

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> ...during the course of an individual's employment such individual was regularly and continuously exposed to coal dust during the course of employment. The presumption may be rebutted by a showing that the employee was not exposed to coal dust for significant periods during such employment.

20 C.F.R. §725.492(c).

We conclude therefore that employer's mere assertion that the total of 670 hours of coal mine employment during a twelve-year period does not constitute "significant" exposure fails to rise to the level of rebuttal. *See Rowan v. Lewis Coal and Coke Co.*, 12 BLR 1-31 (1988); *Hendrik v. Sterling Smokeless Coal Co.*, 6 BLR 1-1029 (1984); *Zamski v. Consolidation Coal Co.*, 2 BLR 1-1005, 1-1011 (1980); *see also Rowan*, 12 BLR at 1-34; *Harriger v. B & G Construction Co.*, 4 BLR 1-542 (1982); *Moore v. Duquesne Light Co.*, 4 BLR 1-40.2, 1-48 (1981).

and Order at 4, he has failed to specifically weigh it against the contrary evidence and give his reasons for according greater weight to the evidence of complicated pneumoconiosis. This failure constitutes error. *See Lester*, *supra*; *Melnick*, *supra*; *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Accordingly, we vacate the administrative law judge's determination that claimant has established the existence of complicated pneumoconiosis at Section 718.304, and remand the case for a reweighing of all the relevant evidence of record. *See Compton*, *supra*. If, on remand, the administrative law judge determines that claimant is unable to establish the existence of complicated pneumoconiosis, but is able to establish the existence of simple coal workers' pneumoconiosis, then the administrative law judge must address whether the other elements of entitlement are also established. *See* 20 C.F.R. §§718.202, 718.203, 718.204(c), (b); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge